

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 13, 2011

Carlos Ortiz
SBI No. 0048
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State of Delaware v. Carlos Ortiz
Def. ID No. 0208005710
Letter Opinion

Date Submitted: April 12, 2011

Dear Mr. Ortiz:

This is my decision on your fourth motion for postconviction relief. You were convicted of two counts of Rape in the First Degree, one count of Attempted Rape in the First Degree, six counts of Possession of a Firearm During the Commission of a Felony, one count each of Kidnaping in the First Degree, Possession of a Firearm by Person Prohibited, Burglary in the First Degree, Aggravated Menacing, Terroristic Threatening, Criminal Contempt, and three counts of Endangering the Welfare of a Child. The convictions arose out of your rape of your estranged wife, Marisol Ortiz. You and Marisol were separated and no longer living together. During the night of August 8, 2002, Marisol awoke to find you in her bedroom. You pointed a gun at her and demanded that she come back to you. You also wanted to have sex with Marisol. When Marisol refused, you raped her. While this was happening in Marisol's bedroom, your children, Geovany, Carlos, Jr., and Karla, were paralyzed with fear in the living room. Marisol eventually escaped and ran

next door to her brother's house for help.

I sentenced you to 84 years at Supervision Level V, suspended after serving 68 years for declining levels of probation. The Supreme Court affirmed your convictions on January 15, 2004.¹ You have previously filed three motions for postconviction relief. I denied each one of them.

You now argue that (1) the State did not comply with the timing requirements of 11 *Del.C.* § 3507 when it offered into evidence certain out-of-court statements made by the witnesses against you at your trial, (2) your attorney failed to request the redaction of certain statements made by the police officer when he interviewed the witnesses before their taped interviews were played for the jury, (3) your attorney failed to investigate and present the evidence regarding your domestic circumstances to the jury, and (4) there are some recently decided cases that are helpful to you. After receiving your fourth motion for postconviction relief, I wrote you a letter informing you that your arguments were too vague and conclusory for me to consider. However, instead of summarily dismissing your motion, I gave you an opportunity to clarify and supplement your arguments, which you did do. The State was represented at trial by Melanie C. Withers, Esquire. You were represented at trial by Karl Haller, Esquire. Haller filed an affidavit responding to your arguments. Given the nature of your arguments, I have concluded that a hearing is not necessary.

I. Out-of-Court Statements

You argue that the State did not comply with the timing requirements of 11 *Del.C.* § 3507 when it offered certain out-of-court statements made by the witnesses against you

¹ *Ortiz v. State of Delaware*, 841 A.2d 308, 2004 WL 77860 (Del. Jan. 15, 2004).

at your trial. 11 *Del.C.* § 3507 states:

(a) In a criminal prosecution, the voluntary, out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

(b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not.

The typical situation implicated by this statute occurs when a witness makes statements to a police officer before the trial. At trial the witness will testify about the pre-trial statements and then the police officer will testify about the witness's pre-trial statements. The Delaware Supreme Court has addressed the timing of when these statements are to come into evidence in several cases. In *Smith v. State*² the Supreme Court held that the "statement [of the declarant] must be offered into evidence no later than at the conclusion of the direct examination of the declarant." In *Turner v. State*³ the Supreme Court held that absent a stipulation of the parties accepted by the trial court, the timing requirements of *Smith* apply to jury and bench trials alike.

Marisol was interviewed by Delaware State Police Detective John Mitchell at the hospital where she went to for treatment after you raped her. The interview was tape recorded. You argue that the State violated the timing requirements of Section 3507 when Marisol and Detective Mitchell testified about her pre-trial statements. Marisol testified on Monday, April 28, 2003. The following exchange took place at the conclusion of Marisol's direct examination:

² 669 A.2d 1 (Del. 1995).

³ 5 A.3d 612 (Del. 2010).

Ms. Withers: We discussed it in chambers. I'm to the point I am handing her over for cross-examination. I wanted to make sure Mr. Haller didn't want me to offer the 3507 statements now.

Mr. Haller: I'll cross now.

The Court: Cross her now and we will do, whenever we do those witnesses, at the end of those witnesses you can have her brought back if you want to do more examination of her. Mr. Haller, is that okay?

Mr. Haller: Okay.⁴

The State offered to have Detective Mitchell testify about Marisol's pre-trial statements immediately at the conclusion of her direct testimony. The State also gave Mr. Haller the choice of cross-examining Marisol at the conclusion of her direct testimony or after Detective Mitchell testified. Haller elected to cross-examine Marisol at the conclusion of her direct testimony. I also gave Haller the opportunity to call Marisol back to the witness stand after Detective Mitchell testified. Detective Mitchell testified on Wednesday, April 30, 2003. The State introduced through Detective Mitchell his tape-recorded interview of Marisol while she was at the hospital. The State was ready and willing to comply with the timing requirements of Section 3507. However, Haller made a strategic decision and decided to cross-examine Marisol before Detective Mitchell played her taped pre-trial statements for the jury. I allowed him to do that and will not second-guess his strategic decision now. This argument is without merit.

You also argue that the State violated the timing requirements of Section 3507 when it played the video of the crime scene taken by Delaware State Police Officer Steven

⁴ Transcript at A-107.

Swain. However, you do not specify what your objection is to the crime scene video or which statements allegedly came in improperly. Furthermore, Haller did not object to the video of the crime scene.⁵ I and the Supreme Court have repeatedly dealt with your unfounded arguments of improper Section 3507 statements and continuously ruled that your arguments were without merit.⁶ This argument is conclusory and without merit.

II. Ineffective Assistance of Counsel

In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.⁷ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.⁸ Second, the defendant must show that the deficient performance prejudiced the defense.⁹ Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."¹⁰ It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing

⁵ Transcript at B-37.

⁶ *Ortiz v. State*, 841 A.2d 308, 2004 WL 77860 (Del. Jan 15, 2004)(TABLE), *State v. Ortiz*, 2007 WL 901639 (Del. Super. Mar. 22, 2007), *Ortiz v. State*, 941 A.2d 1019, 2007 WL 4462942 (Del. Dec. 20 2007)(TABLE), *Ortiz v. State*, 5 A.3d 631, 2010 WL 3719885 (Del. Sep. 23, 2010)(TABLE).

⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁸ *Id.* at 687.

⁹ *Id.*

¹⁰ *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

that representation.”¹¹ There is no procedural bar to claims of ineffective assistance of counsel.¹²

A. Interview Statements

You argue that Haller was ineffective because he did not insist that certain statements made by Detective Mitchell when he interviewed Marisol be redacted before her taped interview was played for the jury. When I first read this argument I could not understand it, so I asked you to explain it. In your explanation you referred to the trial transcript at Volume C, Page 120, Line 9, which is where Detective Mitchell’s tape-recorded interview of Marisol was played for the jury. It is true that Haller did not object to her taped interview being played for the jury. However, you do not identify a single statement made by Detective Mitchell that should have been redacted prior to Marisol’s taped interview being played for the jury. The most that I can glean from your argument is that Detective Mitchell stated sometime during his interview of Marisol that you had a shotgun with you when you threatened her. Your argument does implicate Section 3507 and it is an area that the Delaware Supreme Court has addressed. In *Hassan-El v. State*¹³ the Supreme Court held that statements made by police interrogators that they know what happened and whether or not the witness was being truthful or untruthful with them are beyond the scope of Section 3507. The Supreme Court further held that the best way to properly present Section 3507 evidence is by a written statement from the declarant or a

¹¹ *Coleman*, 2003 WL 22092724, at *2, *quoting Strickland*, 466 U.S. at 689.

¹² *Coleman*, 2003 WL 22092724, at *1, *citing State v. Johnson*, 1999 WL 743612, at *2 (Del. Super. Aug. 12, 1999).

¹³ 911 A.2d 385 (Del. 2006).

redacted recorded statement of only the declarant's words.¹⁴ Since you have not identified the statements allegedly made by Detective Mitchell that should have been redacted, there is nothing for me to consider. Moreover, I note that Marisol and all three of your children testified that you had a gun when you broke into her trailer. Marisol testified that you came into her room and put a gun in her face. She described it as a long black rifle that she had seen before at the house she and you shared when you were together. Marisol testified further that it was one of three guns that you had, one of which was a shotgun. She did testify that the long gun you had the night that you raped her was not the shotgun. Karla testified that you had a big gun in your hand when you threatened to kill Marisol. Geovey testified that you had a black and brown rifle that was two and one-half feet long with you and that you pointed it at Marisol and said that you were going to kill her. Carlos, Jr. testified that you had a rifle that was a couple of feet long and that you pointed it at Marisol and threatened her. Since all four witnesses offered consistent testimony about the gun you carried into the trailer, I find no error at all on Haller's behalf. Moreover, even if there was an error, I fail to see how it prejudiced your defense.

B. Witness Credibility

You argue that Haller was ineffective because he allegedly did not conduct a thorough pretrial investigation of your domestic situation and present it to the jury. You argue that this was relevant because it would have shown that your children were persuaded by Marisol to testify against you. You argue that Marisol was able to do this because she had custody of the children at the time of the trial and thus was able to

¹⁴ *Id.*

influence them. You also stated that your argument was supported by articles regarding the relationship between parents and children and the effect of that relationship on the children's testimony. I asked you to identify the articles that supported your argument. In response, you submitted an article titled "The Taint Hearing: False Allegations of Child Sexual Abuse" by Allen Cowling.¹⁵ While there were no allegations of child sexual abuse in your case, the premise of your argument is that because Marisol offered the least amount of resistance to your children's wants and needs, they were more inclined to provide testimony that supported her allegations instead of your defense. Your argument is not supported by the evidence. The jury was well aware of both your domestic situation and your argument that Marisol caused your children to testify against you.

You and Marisol were married for 14 years, but had been separated for several months at the time of the crimes. Marisol was unhappy with you because you were jealous and abusive to her. Indeed, it got so bad that Marisol got a protection from abuse order from Family Court so that you would have to stay away from her. You did have custody of the children. However, this was apparently only because Marisol was unable to provide suitable housing for them. She did have visitation rights though. The children lived with your brother for three months after you were arrested. They then moved back to Marisol's trailer and were living with her at the time of your trial. A hearing to address the custody of the children was scheduled for August 15, 2002. It was your plan to move to Boston with the children and you testified that Marisol knew it. Your defense to the criminal charges against you was that Marisol made up the rape charges so that she could get

¹⁵ [Http://www.allencowling.com/lawtaint.htm](http://www.allencowling.com/lawtaint.htm).

custody of the children. The issue of why your children would testify falsely against you did come up at the trial. You told the jury that they were living with Marisol and that she might have forced them to testify against you. The prosecutor noted that your children were interviewed soon after the crimes at a time when they were not living with Marisol and were not subject to her influence. Quite simply, your children had all given statements to the police soon after you raped Marisol that were consistent with their trial testimony and made long before she was in a position to influence them. This argument is without merit.

III. Retroactive Case Law

You argue that recent cases decided under 11 *Del.C.* § 3507 are applicable to your case. This is not correct. As discussed in my consideration of your first argument, the timing requirements of 11 *Del.C.* § 3507 were met by the State. The State was ready to provide the Section 3507 statements at the conclusion of Marisol's direct testimony, but Haller chose to cross-examine her first. In your second argument you discuss "redacted testimony" versus "original testimony," but you do not identify those statements by Detective Mitchell that should have been redacted, leaving me with nothing to consider. Furthermore, Haller was aware of the testimony and did not object to it. The facts of your case do not support your arguments. This argument is merely conclusory and without merit.¹⁶

¹⁶ Your argument that because case law has been decided in the past year on an issue tangentially related to an issue you raise does not make it (1) applicable to your case, or (2) remove the procedural time bar. The procedural time bar starts one year from the time your convictions became final, not the last time you chose to file a motion for postconviction relief.

CONCLUSION

Your fourth motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office
cc: Melanie C. Withers, Esquire
Office of the Public Defender
Karl Haller, Esquire